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No. 82-545

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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Respondent NRDC contends that the Nuclear Regulatory Commission ("NRC") has ignored "[e]stablished NEPA [j]urisprudence" (Br. in Opp. 14) by failing to allow consideration of uncertainties in the environmental costs in nuclear power plant licensing proceedings. It also argues that the administrative record fails to support the Commission's generic waste disposal rule. Finally, respondent urges that review of this case will delay efforts by Congress and the Commission to deal with the problem of nuclear waste disposal. Each of these contentions is without merit.

1. Respondent argues that both established precedent and Council on Environmental Quality ("CEQ") regulations support the proposition that "uncertainty about the [environmental] costs associated with a proposed action is no reason to exclude such costs from consideration in the

actual decisionmaking process" (Br. in Opp. 17). But in this case the NRC *has* considered the uncertain costs associated with the fuel cycle, in the course of promulgating the Table S-3 Rule. The NRC does not "sweep [those costs] under the rug" (*ibid.* n.23) by analyzing them generically. It simply avoids the repetitive and potentially inconsistent treatment that would ensue if they were reconsidered by licensing boards in individual proceedings.

The CEQ regulation (40 C.F.R. 1502.22) on which respondent relies for its interpretation of the National Environmental Policy Act ("NEPA") did not become effective until after the NRC issued its final version of the Table S-3 Rule. (See 43 Fed. Reg. 56002 (1978) (CEQ regulations effective July 30, 1979); 82-524 Pet. App. 383a (Table S-3 Rule approved July 27, 1979).)The former CEQ guidelines (38 Fed. Reg. 20553-20554 (1973)), which the NRC followed in performing its NEPA responsibilities (10 C.F.R. 51.1(a)), contained no requirement of a "worst case" analysis. To invalidate the NRC's rule on the basis of a later-adopted CEQ regulation is to ignore this Court's teaching in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 555 (1978), that review of NEPA compliance is "limited * * * by the time at which the decision is made * * *."

Even if it were relevant, 40 C.F.R. 1502.22's requirement that "the agency * * * include a worst case analysis and an indication of the probability or improbability of its occurrence" was fully satisfied here. Table S-3 explicitly refers (82-524 Pet. App. 257a n.1) to the Office of Nuclear Material Safety and Safeguards' "Environmental Survey of the Reprocessing and Waste Management Portions of the LWR Fuel Cycle," NUREG-0116 (1976).[1] NUREG-0116

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[1]NUREG-0116 was filed as Volume V of the Joint Appendix Supplement in the court of appeals.

contains a thorough analysis of the consequences of a repository failure, including even such "worst case" scenarios as a direct hit by a meteorite two kilometers in diameter. *Id.* at 4-86 to 4-99.

2. Respondent seems to contend (Br. in Opp. 19-24) that the administrative record and subsequent events undercut the NRC's position concerning the risk of environmental impacts. This argument is in part a belated effort to square the court of appeals' decision with this Court's instruction on remand of *Vermont Yankee* (435 U.S. at 549):

> [T]he question [remains] whether the challenged rule finds sufficient justification in the administrative proceedings [.] * * * The court should engage in this kind of review and not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are "best" or most likely to further some vague, undefined public good.

But the court of appeals did not decide whether the expanded administrative record supported the "Commission's conclusion that the probabilities favor the zero-release assumption" (82-524 Pet. App. 35a n.96). Instead respondent contended, and the court found, that the rule violated NEPA because it precluded licensing boards from reconsidering and weighing anew the uncertainties recognized by the Commission (*ibid.*). It is too late to suggest that the court of appeals—had it limited itself to its assigned task of exploring the record—would have come to the same conclusion as it did for other, and improper, reasons.

3. Respondent also argues (Br. in Opp. 28-29) that review in this Court would sidetrack ongoing efforts by Congress and the Commission to resolve the problem of nuclear waste. Congress is indeed considering a comprehensive national policy on nuclear waste disposal. The

pending legislation does not, however, deal with the licensing of nuclear power plants. It addresses instead the development of waste storage and disposal facilities, and speaks of environmental review only in connection with the development of sites for such facilities.[2]

The possibility that review by this Court would sidetrack the Commission's "waste confidence" proceeding (see 44 Fed. Reg. 61372 (1979)) is similarly remote, since the D.C. Circuit has imposed a deadline of June 30, 1983, for completion of that proceeding. See *Potomac Alliance* v. *NRC*, 682 F.2d 1030, 1032 (D.C. Cir. 1982).

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[2]The Senate version of the National Nuclear Waste Policy Act, passed April 29, 1982, provides in Section 405(a) for the preparation of an environmental impact statement ("EIS") on recommendation by the Secretary of Energy to the President to approve a specific repository site. S. 1662, 97th Cong., 2d Sess., 128 Cong. Rec. S4325, S4331 (daily ed. Apr. 29, 1982). Section 404(b)(1)(A) proyides that earlier efforts to find and test possible sites will not require an EIS but only an "environmental assessment." *Id.* at S4330. Equivalent provisions of the pending House version are found at Sections 114(f) and 112(b)(1)(A); see also Section 216(b). H.R. 7187, 97th Cong., 2d Sess., 128 Cong. Rec. H8179, H8181-8183, H8192 (daily ed. Sept. 30, 1982). These and other provisions of various proposed bills provide a "roadmap" for compliance with NEPA, see H.R. Rep. No. 97-491 (Pt. 1), 97th Cong., 2d Sess. 47 (1982), whose purpose is "to avoid excessive and duplicative environmental review." 128 Cong. Rec. H8197 (daily ed. Sept. 30, 1982) (remarks of Rep. Breaux).

We will of course inform the Court of any developments concerning the bills which may bear on the proper disposition of this case.

For these reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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